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Supplemental Proposal
Regulatory Evaluation
Regulatory Flexibility Analysis
Unfunded Mandates Reform Act Analysis

Supporting Documents for Verification of Drivers' Hours of Service

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Supporting Documents for Verification of Drivers' Hours of Service Regulatory Evaluation

The FMCSA is issuing an SNPRM clarifying the requirements concerning documents motor carriers must collect and maintain to monitor their drivers' compliance with the Hours of Service regulations. These clarifications impose no new regulations and therefore impose no new costs or benefits. The purpose of the regulation is to bring existing rules into conformity with recent directions given by Congress and to remove any potential for misunderstanding of the rules by motor carriers or enforcement personnel.

As a result of past misunderstanding, some motor carriers and drivers did not believe the rule applied to them. They will now incur costs which they should have incurred with the passage of the previous rule. We estimate those costs and put them in the context of the benefits necessary to make this proposal cost-effective.

Cost-effectiveness occurs when the benefits from a proposal equal or exceed the costs. In this case, that is the cost-effectiveness of clarifying the rule versus ignoring the misinterpretations. Given Congressional direction and an internal desire for clarity, consistency, and fairness, ignoring the misinterpretations is not an option. However, going through the calculations provides a meaningful reality check and perspective. If one were to assume that 25 percent of owner-operators are not in compliance with the existing regulations, the cost to bring them into compliance would be $14.2 million per year. As explained below, in order for this proposal to be cost-effective, it would have to deter an estimated 228 crashes, including 2.3 fatal crashes.

Background

The Current Requirements

Drivers are generally not permitted to drive for more than 11 hours in the aggregate following 10 consecutive hours off duty, or drive after being been on duty for more than 14 hours after 10 consecutive hours off duty. Furthermore, drivers may not drive after having been on duty for 60 hours in 7 consecutive days or, if the motor carrier operates every day of the week, after having been on duty for 70 hours in 8 consecutive days. Drivers are required to maintain records to verify their compliance with these regulations.

Motor carriers have the duty to verify the accuracy of all of their drivers' hours of service and records of duty status (RODS). To do this and to allow enforcement personnel the ability to perform audits, they must retain sufficient supporting documentation for six months. Motor carriers must also ensure that drivers collect and submit all supporting documents with the RODS. Part 395.2 does not define supporting documentation.

Part 390.31 requires motor carriers to keep records and documents in their original form, as photographic copies that are readily accessible, or, for documents not requiring a signature, using computer technology that can produce a printout of the data. All of these records can be stored on-site with immediate retrieval available or at a remote site if the documents can be made available within 48 hours after a request is made.

To allow enforcement personnel the ability to verify the records of duty status that every driver who operates a commercial motor vehicle must keep, motor carriers shall maintain RODS and all supporting documents for each driver it employs for a period of six months from the date of receipt. Before that "receipt," each driver must retain their records in their possession for seven days to allow roadside inspections.

Owner-operators who drive for themselves are motor carriers. Owner-operators may also be contractors for other motor carriers. They are "employees" of the motor carrier as defined in 49 CFR 390.5, although they may not technically be "employees" under other Federal rules. In this case, it was possible that each assumed the six-month record retention requirement fell upon the other party. In this hypothetical, it could be the case that no one would keep the records. If this hypothetical does not occur, there would be no cost to implementing this rule since all carriers could continue their current practices or transfer responsibility for these functions from one party to another.

The current regulations do not prescribe how supporting documents must be tied to specific trips, drivers, or vehicles. There is no specific regulatory requirement that drivers sign or otherwise annotate their supporting documents.

Issues

The agency's predecessor, the Federal Highway Administration (FHWA), published a notice of proposed rulemaking (NPRM) for this action on April 20, 1998 (63 FR 19457, RIN 2125-AD52, Docket No. FHWA-98-3706), requesting comments on a proposed definition of "supporting documents" for the HOS regulations. The FHWA proposed that motor carriers develop and maintain effective auditing systems that would not have required the retention of supporting documents to monitor the accuracy of the drivers' RODS. The NPRM proposed that, if a motor carrier fails to have such a system, the motor carrier would be required to retain various types of business documents. The use of electronic recordkeeping methods was also proposed as a preferred alternative to paper records. The FMCSA analyzed the comments received to this NPRM in its broad Hours of Service of Drivers rulemaking published on May 2, 2000.

The FMCSA has always broadly defined supporting documents. In 1997 regulatory guidance, FMCSA stated:

> "Supporting documents are the records of the motor carrier which are maintained in the ordinary course of business and used by the motor carrier to verify the information recorded on the driver's record of duty status. Examples are: Bills of lading ..., weight/scale tickets, fuel receipts, fuel billing statements, [and] toll

> receipts. ... Supporting documents may include other documents which the motor carrier maintains and can be used to verify information on the driver's records of duty status."

The FMCSA intended these statements to require the retention of documents sufficient to verify hours of service compliance and to include not merely the documents that the particular motor carrier actually uses to check its drivers but rather "documents that pass through the carrier's hands in the normal course of business and which could be used to verify the information recorded on a driver's RODS." Andrew's Trucking Co. challenged the FMCSA's position on this and other issues. In July of 2002 the United States Court of Appeals for the District of Columbia Circuit decided the Andrews case in FMCSA's favor. Specifically, the court ruled FMCSA's interpretation that supporting documents include toll receipts because they "could" be used to verify drivers' hours of service compliance was not a change from what was previously announced. Whether the motor carrier actually uses the documents for verification purposes does not affect whether the supporting documents need to be retained in a fashion allowing verification of compliance.

The FMCSA has always maintained, and the courts have consistently upheld, that carriers must maintain the supporting documents in a fashion that allows the agency to enforce compliance. The United States Court of Appeals for the Sixth Circuit affirmed in A.D. Transport Express Inc. v. Federal Motor Carrier Safety Administration, 290 F.3d 761 (6th Cir. 2002) that supporting documents must be maintained in a common sense manner so that FMCSA investigators can "verify dates, times, and locations of drivers recorded on the RODS." More recently, the United States Court of Appeals for the District of Columbia Circuit found an FMCSA requirement that supporting documents must be maintained in a fashion that permits the matching of those records to the original drivers' RODS as a reasonable interpretation of 49 CFR 395.8(k)(1). In fact, the Court opined that all the FMCSA is asking is that carriers refrain from destroying the agency's ability to match records with their associated drivers (Darrell Andrews Trucking v. Federal Motor Carrier Safety Administration, No. 01-1118 (D.C. Cir. 2002).

Even though the court rulings agree with FMCSA's interpretation of the rule, the very fact that this matter had to be decided in court indicates that the wording of the rule is not explicit enough. Current rules make no specific mention of a requirement for a self-monitoring system for carriers to make sure that they have all the necessary supporting documents. However, it is difficult to imagine carriers are able to keep track of all of the hours of all of their drivers (even if there is only one driver) and not keep records and supporting documents in some organized fashion.

In 1994, the Congress passed the Hazardous Materials Transportation Authorization Act. Section 113 directed the Secretary of Transportation to promulgate regulations relating to supporting documents. Specifically, section 113(b) mandates that the regulations include, among other items:

- A description of identification items that shall be a part of each supporting document.
- A specification of the number and type of supporting documents required to allow verification of the accuracy of the RODS.
- A specification of the duration that such documents shall be retained.
- Provisions to allow motor carrier self-compliance systems that ensure driver compliance and audits of those systems, on a case-by-case basis.
- Provisions to allow waivers for carriers providing sufficient information through an "Intelligent Transportation System," on a case-by-case basis.

Owner-operators, who drive for other motor carriers on a contract basis, are not included explicitly enough under some portions of the current rules. Clearer definitions need to address enforcement in this situation and close this loophole.

The FMCSA is publishing this NPRM because of the apparent lack of clarity of the existing supporting documents rule and because of the Congressional mandate to remove the confusion surrounding this rule.

Changes Proposed by this Rule

This proposed rule merely clarifies what the Federal Motor Carrier Safety Administration intended through existing rules. Since at least some carriers interpreted those rules differently than intended, the proposed rulemaking seeks to clarify those rules.

The basic hours of service rules are not changing. Therefore, there is no need to alter the basic structure of operations nor is there any equipment to purchase. The only possible change from this proposal involves record keeping and retention of documents. Since FMCSA and the courts agree that all documents received in the normal course of driving have been and will continue to be retained for six months, there is no additional cost from this clarification. If some carriers came to a different conclusion concerning the requirements of the previous rule they will bear additional costs of increased record keeping. However, those costs should have been included in the analysis of the prior rule and counting them here would amount to double counting. Likewise, the costs of a self-monitoring system should have been included in previous rules. While clarified in this rule, motor carriers had to have some analogous system in order to keep their records and allow compliance reviews.

This proposal also contains provisions which extend the existing rules to better conform to new direction from Congress. Owner-operators are to be explicitly included with other motor carriers for record-keeping purposes. In the case where owner-operators drive for other motor carriers, it was possible that each assumed the six-month record retention requirement fell upon the other party. The rule clarifies that "all drivers, whether company paid or owner/operator, have a current regulatory obligation not only to comply with the HOS and RODS requirements, but also to cooperate with their motor carrier employers by collecting and submitting the supporting documents needed to verify

compliance with the rules." Therefore, "drivers must submit supporting documents to the motor carrier at the time the corresponding record of duty status is submitted."

As for benefits, these changes will clarify areas that were interpreted differently by different motor carriers and will make enforcement easier through increased standardization. Easier enforcement results in more even enforcement and better compliance. That should result in fewer tired drivers and safer roadways.

Costs

While we do not believe this rule will impose any costs because all of its requirements are already required, the FMCSA has prepared the following analysis to show the effects on those not complying with the current rule. Their costs should be attributed to previous rules, even if, due to misunderstanding, they only begin assuming those costs after this clarification.

Drivers whose records were not retained will have to place identifying information on all supporting documents that could be used to verify their RODS. Recognizing that no two routes will be the same regarding the amount of documentation produced, we used some standard figures to approximate the central tendency of costs. We assume that ten pieces of paper will need to be kept from each full day of travel. We estimate that it takes approximately 15 seconds to write the necessary information on each piece of paper. Assuming 250 full workdays in a year, that works out to 625 minutes, or 10.42 hours, per driver per year. Using Bureau of Labor Statistics (BLS) data on "Median Weekly Earnings" from the Occupational Employment and Wages Estimates data for 1999 and 2000, we estimate average truck driver's wages of $15.82 per hour (including a 20 percent increase to account for employee fringe benefits). Annualized, this is $165 per driver affected.

We assume that this cost is imposed only on owner-operators who believed they were not covered under the previous version of the rule. According to Professor LaFontaine of the University of Michigan, there are approximately 300,000 owner-operators.[1] We assume that most of these owner-operators are complying with these provisions. If only 75 percent of owner-operators are currently collecting and retaining the required supporting documents, 75,000 (.25 * 300,000) are not. This translates into an annual compliance cost of $12.4 million (75,000 * $165).

Owner-operators will also have to perform the administrative tasks of filing, maintaining, periodically deleting, and, if inspected, retrieving the supporting documents. This whole process will take between 1 and 2 hours, depending on many factors. We use a proxy of one and a half hours and the same wage rate (since this time will come out of driving for owner-operators). This amounts to just under another $1.8 million, for a total of $14.2 million.

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[1] Francine Lafontaine, Incentive Contracting in Practice: A Detailed Look at Owner Operator Leases in the US Truckload Trucking Industry, Working Paper, June 2000, available at http://webuser.bus.umich.edu/Departments/BusEcon/research/workingpapers.html#lafontaine

Motor carriers must have a self-monitoring system in place. This system should explain how they use supporting documents (and other means) to ensure that their drivers comply with the hours of service regulations. Since this is not a new requirement, it will not impose any additional costs to motors carriers.

Benefits

The direct benefits of this rule are better conformity with the instructions of Congress, better clarity, and more even and thorough enforcement of hours of service regulations. Enforcement is only a shadow benefit of the real benefit sought, which is safer roadways. Conformity and clarity are desirable qualities that don't lend themselves to straightforward quantification; therefore we do not estimate a value for these benefits.

It would be most desirable if we could directly compute the decrease in highway accidents and fatalities as a function of easier enforcement of hours of service rules. Surely such a function exists in a probabilistic sense, but knowing or estimating that function would require experimentation in the real world, costing real lives. Therefore, we present the reduction in accidents necessary to make this rule cost-effective.

We know from previous studies that accidents occur roughly in proportion, with fatalities being the rarest and property-damage-only (PDO) being the most common. We have not found anything in this rule to suggest that it would affect one severity category differently from any other, so we will assume that those proportions will be unaltered.

Table 1
Number of Crashes and Costs, by Severity

	PDO	Injury	Fatal	Total
Crashes[2]	338,000	96,000	4,917	438,917
Percentage	77%	22%	1%	100%
Cost per Crash[3]	$5,026	$100,382	$3,650,810	

Keeping the ratio constant, averting 1 accident involving a fatality also averts 22 accidents with injuries and 77 accidents with PDO. Therefore, a measure that averts one fatal accident results in total savings of $6,246,216 from the 100 total accidents avoided. Even if these costs were considered new costs, the rule would only have to avert more than 228 accidents annually to be cost-beneficial, of which about 2.3 would involve a fatality, 50.2 would involve an injury, and 175.5 would involve PDO. Multiplying these values by the corresponding values from Table 1 yields $14.3 million in savings from reducing the accident rate.

[2] FMCSA, "Large Truck Crash Facts 2000," Tables 13 through 18. 2002.
[3] Zaloshnja, Eduard, Ted Miller, and Rebecca Spicer (National Technical information Service, Springfield, VA) *Costs of Large Truck- and Bus-Involved Crashes,* October 2000. (Inflated to 2002 dollars.)

Regulatory Flexibility Act Analysis

Directive and Background

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement and Fairness Act (SBREFA), requires Federal agencies to analyze the impact of rulemakings on small entities, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. No analysis is required because this rule does not impose any costs and therefore does not impose any costs upon small entities. However, regardless of negligible potential economic impact, because of the considerable public interest in these proposals, the FMCSA has prepared this RFA analysis. To do this in the broadest possible terms, we counted all the costs that small entities might begin to bear as a result of publication of this clarification, even if those costs should have been borne by them all along.

An RFA analysis must include the following elements:

1) A succinct statement of the objectives of, the legal basis for, the rule;
2) A summary of significant issues raised by the public comments in response to the initial regulatory flexibility analysis;
3) A description of, and, where feasible, an estimate of the number of small entities to which the rule will apply;
4) A description of the reporting, record keeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
5) A description of the steps the agency has taken to minimize the significant impact on small entities, consistent with the stated objectives of applicable statutes.

The following sections contain the FMCSA's RFA analysis.

Regulatory Flexibility Act Analysis

For Supporting Documents for Hours of Service Procedures Changes

1. Objectives and Legal Basis

   The Hours of Service requirements are found in part 395 of title 49 of the Code of Federal Regulations. 49 CFR 395.8(k), requires motor carriers operating in interstate commerce to retain supporting documents, along with drivers' records of duty status, for at least six months from the date of receipt. In 1982, when that rule was published, the term "supporting document" was not specifically defined. More recently, the United States Court of Appeals for the Sixth Circuit affirmed in A.D. Transport Express Inc. v. Federal Motor Carrier Safety Administration, No. 00-3891, that supporting documents must be maintained in a common sense manner so that FMCSA investigators can verify dates, times, and locations of drivers recorded on the RODS.

The main cost generating element of this rule is to bring all owner-operators into compliance with the record keeping requirements of the hours-of-service regulations. We assume 25 percent of owner-operators are not in compliance with the existing regulations for cost estimation purposes. Owner-operators are acting as either drivers or motor carriers. Enforcement personnel must quickly inspect supporting documents of drivers, owner-operators, and motor carriers.

2. Public comments on initial RFA
The FMCSA did not publish an initial RFA, but the National Association of Small Trucking Companies (NASTC) commented that carriers generally recognize their obligation not only "to trust but to verify" the drivers' logs submitted. Their comments generally identify the rule as clarifying already required practices. The NATSC also believes that the supporting documents rule should provide examples of acceptable carrier programs that would meet the rule's requirements. The rule needs to be well defined so as to preclude safety investigators using personal discretion to determine whether alternative systems of retaining supporting documents are effective in carrying out the intentions of this rule.

3. Small Entities to which the Rule will Apply
This action already applies to those small entities regulated by the FMCSA that use CMV drivers. It is difficult to determine exactly how many small employers will be affected by this final rule, partly because it is unknown how many carriers were unaware that the existing rule applied to them and partly because it is not known year-to-year how many small employers on average would be likely to use a CMV driver. However, as of June 2003, there were 650,000 motor carriers on the FMCSA's Motor Carrier Management Information System (MCMIS) census file. This includes both for-hire and private motor carriers. The Small Business Administration (SBA) defines small businesses in the motor carrier industry based on thresholds for average annual revenues, below which SBA considers a motor carrier small. For trucking companies, the threshold is $21.5 million in annual sales, while for motorcoach and related industries the threshold is $6 million in annual sales. Data from the 1997 Economic Census (U.S. Census Bureau), North American Industrial Classification System (NAICS) Code 4841, "General Freight Trucking," indicates that 99 percent of "general freight" trucking firms had less than $25 million in annual sales in 1997 (which most closely corresponds to the SBA threshold of $21.5 million for motor carriers). In the case of passenger (or motorcoach) carriers, the 1997 Economic Census (U.S. Census Bureau), North American Industrial Classification System (NAICS) Code 4855, "Charter Bus Industry," indicates that 94 percent of charter bus firms had less than $5 million in annual sales in 1997 (which most closely corresponds to the SBA threshold of $6 million for passenger carriers).

Because the FMCSA does not have annual sales data on private carriers, it assumes the revenue and operational characteristics of the private trucking firms are generally similar to those of the for-hire motor carriers. Regardless of which of the above percentages is used (99, 94, or 96 percent), FMCSA estimates that

over 600,000 of the approximately 650,000 total motor carriers in the MCMIS Census File meet the definition of small businesses.

Although these small entities would have to keep records verifying all of their employees' status regarding the HOS, there is no additional administrative cost borne by most of them because they already have to maintain those records under the current system. Of the three hundred thousand (300,000) owner-operators, some unknown number are not in compliance due to misinterpretation of the rule. Now they will incur the recordkeeping costs they should have incurred since 1982, which are the same as the costs that other motor carriers have been bearing.

The FMCSA believes that all the costs of this proposal would be borne by owner-operators who were required to bear them all along but were unaware of that fact.

Data from the 1997 Economic Census, NAICS Code 4841(General Freight Trucking) and NAICS Code 4855 (Charter Bus Industry) are contained in the tables 2 and 3.

Table 2
Average Annual Revenues of Small Trucking Firms
(NAICS Code 4841, General Freight Trucking)

Revenue Size	Number of Firms (Percent of Segment Total)	Average Annual Revenues Per Firm (Millions)	Compliance Costs per Driver ($165 per driver), as percent of Annual Revenues Per Firm
Less than $25 million	27,609 (99 percent of segment total)	1.33	0.0124 percent

Table 3
Average Annual Revenues of Small Passenger Carriers
(NAICS Code 4855, Charter Bus Industry)

Revenue Size	Number of Firms (Percent of Segment Total)	Average Annual Revenues Per Firm (Millions)	Compliance Costs per Driver ($165 per driver), as percent of Annual Revenues Per Firm
Less than $5 million	1,022 (94 percent of segment total)	0.98	0.0168 percent

One criterion used by SBA to define a "significant" economic impact to small businesses is the impact on the revenues of entities within a particular sector. According to the SBA guidance "The Regulatory Flexibility Act: an

Implementation Guide for Federal Agencies," The Office of Advocacy, U.S. Small Business Administration, May 2003, http://www.sba.gov/advo/laws/rfaguide.pdf, "if the cost of a proposed regulation exceeds one percent of the gross revenues of the entities in a particular sector" then the regulation should be considered significant. The impact of this regulation on the average annual revenues of small firms in the general freight trucking and charter bus industries is far less than one percent per year in both cases (0.0124 and 0.0168 percent, respectively).

4. Compliance Requirements of the Rule
   Although these small entities will have to keep records verifying all of their employees' status regarding the hours of service, there is no additional administrative cost borne by most of them because they already have to maintain those records under the current system. Some portion of the 300,000 owner-operators will now have to incur some additional cost related to turning in to the motor carriers supporting documents that the owner-operators previously maintained for tax reporting and other business expense purposes.

   The FMCSA believes that all the costs of this proposal will be borne by owner-operators. These owner-operators will require no special technical or professional skills beyond what they already possess.

5. Steps Taken to Minimize Impacts on Small Entities
   As explained above, this rule would have minimal impact on small businesses. No special steps were taken to minimize the impact on them.

Unfunded Mandates Reform Act of 1995

This rule does not impose a Federal mandate resulting in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted for inflation) (2 U.S.C. 1531 et seq.). The total cost of the rule is merely $14.2 million per year and that will be borne by owner-operators. State and local governments may see a reduction in enforcement costs, but we have not quantified this because it is not clear whether they would seek the same enforcement level at a lower cost or more enforcement at the same cost. For the purposes of this analysis, we assumed the latter.